IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8550 of 1988
with
SPECIAL CIVIL APPLICATION No 158 of 1989

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI Sd/-
and
HON'BLE MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 YES; 2 to 5 NO

SHRIYANS PRASAD JAIN

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 8550 of 1988
MS PP LEHARI Advocate for MR SB VAKIL Senior Advocate for Petitioners
MR DG NANAVATI Advocate for Respondent No. 1
MS MANISHA LAVKUMAR AGP for Respondent No. 2-3

2. Special Civil Application No. 158 of 1989
MR P MEHTA Advocate for NANAVATI ASSOCIATES for Petitioners.
MR DG NANAVATI Advocate for Respondent No. 1
MS MANISHA LAVKUMAR AGP for Respondent No.2-4

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI

and

HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 25/02/2004

ORAL JUDGEMENT

(Per: HON'BLE MR.JUSTICE R.K.ABICHANDANI for the Court)

1. Both these petitions involve common questions and are argued together. The petitioners have challenged the constitutionality of the proviso (ii) contained in Section 2 (n) of the Factories Act, 1948 on the ground that it violates the fundamental rights of the petitioners guaranteed by Articles 14, 19 (1) (g) and 21 of the Constitution of India.

2. In Special Civil Application No.8550 of 1988, according to the petitioner company, it had applied for renewal of its factory licences by mentioning in the renewal applications (copies at Annexure-A collectively to this petition) the name of the factory manager as the "occupier". The company was, however, informed that unless the name of one of its directors was shown as the occupier, renewal applications will not be granted. An accident occurred in the premises of the factory on 6th July, 1988 which resulted in injuries to some of the employees of the factory. The petitioners, therefore, apprehended that in view of the impugned proviso, one of the directors may be prosecuted. The chairman & managing director as also the directors have preferred this petition challenging the said proviso.

3. In Special Civil Application No.158 of 1989, the petitioners have challenged the decision of the respondent No.4 in insisting upon signature of a director of the petitioner company as the "occupier" within the meaning of Section 2 (n) of the Act on the application for renewal of licences submitted by the company and not accepted the signature of the petitioner No.2 who had signed as the "occupier" in the capacity of General Manager of the company. That decision was conveyed under the communication dated 13th July, 1988 sent by the fourth respondent, a copy of which is at Annexure-D to this petition.

4. It was contended by the learned counsel appearing for the petitioners in Special Civil Application No.8550 of 1988 that no objection to renewal of the petitioner's licences could have been raised on the ground that the company had not shown the name of any of its directors as the "occupier", or that it had shown its factory manager

as the "occupier". It was submitted that the impugned proviso was arbitrary, unreasonable and discriminatory and, therefore, violated the provisions of Article 14 of the Constitution. It was also submitted that there were no guidelines in the matter of selecting a director who should be deemed to be the "occupier" as laid down in the proviso. It was argued that the impugned proviso imposes an unreasonable restriction on the fundamental right of the petitioners to carry on occupation, or business, guaranteed by Article 19 (1) (g) of the Constitution, inasmuch as, even though they may not have the ultimate or any control over the factory, they may still be held liable to be prosecuted under the provisions of the Act on the ground that any director would be a deemed occupier of the factory. It was also submitted that the restriction sought to be imposed by the impugned proviso was unrealistic and artificial and was not in the public interest.

5. The learned counsel appearing for the petitioners in Special Civil Application No.158 of 1989 argued that a deeming fiction would be rebuttable and, therefore, the provision that one of the directors shall be deemed to be the occupier was not a mandatory provision, and that Section 2 (n) (ii) did not mandatorily provide that a director alone shall be the occupier. The learned counsel contended that the impugned proviso violated Articles 14, 19 or 21 of the Constitution and, therefore, it should be declared as null and void.

6. The expression "occupier" of a factory as defined in Section 2 (n) of the Factories Act, 1948 means the person who has ultimate control over the affairs of the factory. Prior to amendment of the definition of "occupier", it was provided that in cases where the affairs of the factory were entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory. Those words were omitted with effect from 1.12.1987 by Section 2 of the Amendment Act of 1987 and, as per the amended proviso, it was, inter alia, provided that, in case of a company, any one of its directors shall be deemed to be the occupier. The meaning of the word "occupier" assumes significance in the context of the provisions which lay down the duties of the occupier and consequences of breaches of such duties. Every occupier is required to ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory. Section 7-A enumerates duties of the occupier.

7. The impugned proviso came up for consideration

before the Supreme Court in J.K.INDUSTRIES LTD. AND OTHERS v. CHIEF INSPECTOR OF FACTORIES AND BOILERS AND OTHERS reported in (1996) 6 SCC 665. The Supreme Court negatived similar challenge against the impugned proviso, as is sought to be raised in these petitions, and held that proviso (ii) to Section 2 (n) is constitutionally valid and is not ultra vires Articles 14, 19 (1) (g) or 21 of the Constitution. The Supreme Court held that there was vast difference between a person having the ultimate control of the affairs of a factory and the one who had immediate day-to-day control and that, in case of a company, the ultimate control of the factory, where the company is the owner of the factory, always vests in the company through its Board of Directors. The manager or any other employee of whatever status can be nominated by the Board of Directors of the owner company to have immediate or day-to-day or even supervisory control over the affairs of the company. In para 21 of the judgment, the Supreme Court held:-

"21. .....even where the resolution of the Board of Directors says that an officer or employee, other than one of the directors, shall have the 'ultimate' control over the affairs of the factory, it would only be a camouflage or an artful circumvention because the ultimate control cannot be transferred from that of the company, to one of its employees or officers, where there is a complete transfer of the control of the affairs of the factory. Mechanical recitation of the words of Section 2 (n), as a mantra, in a resolution nominating an employee or an officer as the occupier by stating that he shall have "ultimate control over the affairs of the factory", cannot be permitted to defeat the object of the amendment. The provisions of the Act have to be construed in a manner which would promote its object, prevent its subtle evasion and foil its artful circumvention to suppress the mischief. Though the expression ultimate control was used in Section 2 (n) even prior to the 1987 Amendment also but read with the proviso to Section 100 (2), it gave an opportunity to the companies owning the factory to dilute the rigour of the provision by not notifying one of its directors to be the occupier and instead nominating some employee or the other to be the 'occupier' for purposes of punishment and penalty. The ultimate control which vests in an owner and in the case of a company in the Board of Directors cannot be vested in anyone else

> without completely transferring the control over the factory to that other person. The law does not countenance duality of ultimate control. If the transfer of the control to another person is not complete, meaning thereby that the transferor retains its control over the affairs of the factory, the transferee, whosoever may be, (except a director of the company, or a partner in a partnership firm) cannot be considered to be the person having ultimate control over the affairs of the factory notwithstanding what the resolution of the Board states. The litmus test, therefore, is who has the "ultimate" control over the affairs of the factory."

7.1 In para 39 of the judgment, the Supreme Court held that the possibility of the power being abused was no ground for declaring the provision unconstitutional and that proviso (ii) to Section 2 (n), therefore, did not offend Article 14 of the Constitution. In para 60 of the judgment, the Supreme Court held that the restriction imposed by proviso (ii), if at all it may be called a restriction, has, a direct nexus with the object sought to be achieved and is, therefore, a reasonable restriction within the meaning of clause (6) of Article 19 and that proviso (ii) to Section 2 (n) is not ultra vires Article 19 (1) (g) of the Constitution. In para 62 of the judgment, summing up the conclusions, the Supreme Court, inter alia, held that the impugned proviso was not ultra vires Articles 14, 19 (1) (g) and 21 of the Constitution of India.

7.2 The decision in J.K.INDUSTRIES (supra) was approvingly referred in para 9 of the judgment of the Supreme Court in INDIAN OIL CORPORATION LTD. v. THE CHIEF INSPECTOR OF FACTORIES AND OTHERS reported in AIR 1998 SC 2456 and, in para 16 of the judgment, it was held that the impugned proviso was not in the nature of an exception and that in order to avoid any ambiguity, to plug loopholes and to seal the escape routes, a deeming provision was made in a mandatory form. In case of a company, the directors have the ultimate control as the power to manage the affairs of the company vests in the Board of Directors. It was held that clauses (i) and (ii) of the proviso merely restate the position which was obvious even otherwise. The Supreme Court, however, held that under clause (iii) of the proviso, the position of the Government and the local authority was quite different from that of a firm or an association or a company and that, if it was a case of a factory in fact and in reality owned or controlled by the Central

Government or the State Government or any local authority, then in case of such a factory, the person or persons appointed to manage the affairs of the factory shall have to be deemed to be the occupier, even though for better management of such a factory or factories a corporate form is adopted by the Government.

8. The challenge against constitutionality of the impugned proviso raised in these petitions and argued by the learned counsel appearing in these matters, therefore, stands concluded by the decision of the Supreme Court holding that the impugned proviso does not violate Articles 14, 19 or 21 of the Constitution. Both the petitions, therefore, fail and are rejected. Rule is discharged in each of them with no order as to costs. Interim relief shall stand vacated.

Sd/-

(R.K.Abichandani,J.)

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)